SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1405

EDWIN A. WALKER,

Petitioner,

—against—

THE ASSOCIATED PRESS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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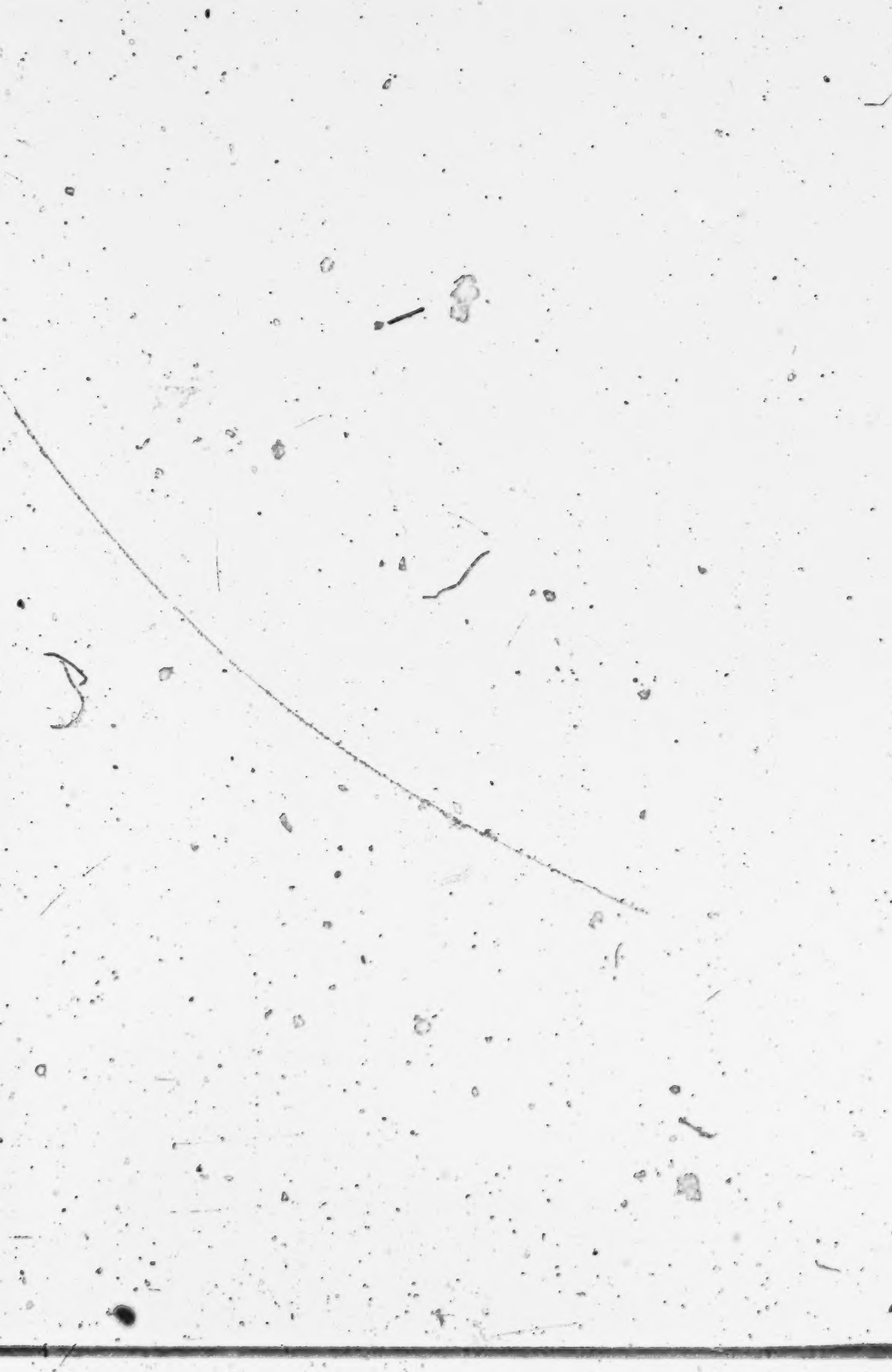

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OPINION BELOW

The opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas is reported at 418 S. W. 2d 379, and is reprinted in the appendix to this brief at p. 1a.

JURISDICTION

Petitioner fails to cite any statutory provision under which he purports to invoke the jurisdiction of this Court.

For the reasons given below, a petition for certiorari may not be the appropriate procedure here.

QUESTION PRESENTED

Petitioner does not correctly state the question presented. The actual question is:

Was the order of the Texas Court of Civil Appeal directing the entry of judgment in favor of Respondent con-

sistent with the mandate of this Court dated July 7, 1967, in No. 150, October Term, 1966 and the opinions of this Court upon which such mandate was based?

STATEMENT OF THE CASE

No useful purpose would be served by a detailed recital of the facts giving rise to the multitude of suits brought by General Walker against The Associated Press, its members or both, or by a point-by-point refutation of the many inaccuracies of fact contained in General Walker's petition. Moreover, it would be pointless to review in detail the opinions of this Court rendered June 12, 1967. It is sufficient here merely to note that all nine Justices of this Court then held, for varying reasons, that The Associated Press was entitled to judgment against General Walker.

Though General Walker now urges that the Texas Court of Civil Appeals misconstrued the mandate of this Court when it directed judgment for Respondent, the General's own Petition for Rehearing in this Court establishes that he, himself, was well aware that this Court intended exactly that result. (See, e.g., Petition for Rehearing dated July 5, 1967, pp. 2, 4, 14).

The procedural history of this case in the Texas courts after remand has, to say the least, been tortuous. The General has availed himself of every procedural device possible under Texas law to stave off or postpone the inevitable judgment for Respondent. But all litigation must some day come to an end, and, in this case, that time has long since passed.

REASONS WHY THE WRIT SHOULD BE DENIED

We note at the outset that, under prior holdings of this Court, a petition for certiorari may not be the appropriate method for testing out whether the court below has com-

plied with the mandate of this Court. *See, e.g., Deen* v. *Hickman,* 358 U. S. 57; *Ex Parte Texas,* 315 U. S. 8. *Cf. Fisher* v. *Hurst,* 333 U. S. 147.

Assuming, however, that a petition for certiorari is appropriate to General Walker's purpose, the petition here is totally without merit: There was not the slightest suggestion in any of the opinions in this Court that this case should have been remanded to the trial court for further proceedings on the issue of malice or on any other issue; or for a new trial; or for anything other than the entry of a judgment of dismissal and the taxation of costs. This is in sharp contrast to *Rosenblatt* v. *Baer,* 383 U. S. 75, 87-88 (1966), wherein this Court explicitly ordered a new trial, and even to the companion case of *Curtis Publishing Co.* v. *Butts,* where two dissenting justices specifically stated that they would have required a new trial (388 U. S. at 174).

General Walker has had ample opportunity to litigate the issue which he here seeks to resurrect, and he has litigated it fully.* He should not be permitted to prolong the

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*All appellate courts before which this case was heard affirmed the trial court's express holding that General Walker failed to establish "malice" or "actual malice" at trial. General Walker also undertook to prove actual malice in his action against Respondent in Louisiana, and obtained a finding of actual malice from the Louisiana Court of Appeal. The judgment in Walker's favor was nevertheless summarily reversed by this Court. 389 U. S. 28, *rehearing denied* 389 U. S. 997.

In still another action brought by Walker against Petitioner in the United States District Court for the Middle District of Florida, the General sought leave to amend his complaint to plead actual malice, stating that he proposed to rely on the same evidence as to actual malice which he had introduced in the Louisiana case. 278 F. Supp. 518, 519. The District Court granted summary judgment for Respondent, holding that the evidence referred to was insufficient as a matter of law to establish actual malice. General Walker did not appeal that decision, and the time for appeal has long since expired.

proceedings in this action for the obvious purpose of harassing Respondent.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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